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September

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 760

NEWTON SAMUEL LOCKE, *Petitioner*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 998-1001) is reported in 166 F. 2d 449.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 5, 1948. (R. 1002.) Rehearing was denied on March 31, 1948. (R. 1008.) The petition for a writ of certiorari was filed on April

22, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the trial court properly instructed the jury as to wilfulness.
2. Whether the admission of certain evidence constituted prejudicial error.
3. Whether the general charge covered petitioner's request for an instruction as to the probative effect of the indictment.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof,

be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1940 ed., Sec. 145.)

STATEMENT

The petitioner was indicted on May 16, 1947, in the Northern District of Texas on ten separate counts. (R. 1-20). The first, third and fifth counts charged that he wilfully attempted to evade and defeat substantial amounts of his individual tax liabilities for the calendar years 1942, 1943 and 1944, respectively. (R. 1-3, 5-7, 9-11.) The second, fourth and sixth counts charged him with the wilfully attempted evasion of a substantial amount of taxes owing by his wife, Lotsie E. Locke, for the same respective calendar years. (R. 3-5, 7-9, 11-13.) The seventh and eighth counts charged that the petitioner wilfully attempted to evade and defeat a large part of the taxes owing by the A A A Air conditioning and Manufacturing Corporation of Texas for the fiscal years ended April 30, 1943, and April 30, 1944, respectively. (R. 13-16.) The ninth count charged that the petitioner wilfully attempted to evade and defeat a large part of the taxes owing by the A A A Roofing Corporation of Texas for the fiscal year ended January 31, 1943. (R. 17-18). The tenth count charged that he wilfully attempted to evade and defeat a large part of the taxes owing by the A A A Plumbing Corpora-

tion of Texas for the fiscal year ended April 30, 1943. (R. 18-20.)¹

The petitioner was convicted by a jury on all counts (R. 39) and was thereafter sentenced as follows: on the first six counts—five years' imprisonment and a fine of \$25,000; on the last four counts—

¹ The indictment charges that the petitioner caused net income and taxes to be understated as follows:

Year	Taxpayer	Under- statement of Net Income	Understate- ment of Tax
1942	Newton Samuel Locke	\$ 37,503.97	\$ 27,273.83
1942	Lotsie E. Locke	37,503.96	27,273.83
1943	Newton Samuel Locke	16,268.42	8,244.98
1943	Lotsie E. Locke	16,268.41	8,244.98
1944	Newton Samuel Locke	60,582.94	38,171.16
1944	Lotsie E. Locke	60,582.95	38,281.34
Fiscal year ended 4/30/43	A A A Air Con- ditioning and Manufacturing Corp. of Texas	216,138.81	174,195.11
Fiscal year ended 4/30/44	A A A Air Con- ditioning and Manufacturing Corp. of Texas	259,006.05	94,044.63
Fiscal year ended 1/31/43	A A A Roofing Corporation of Texas	133,114.18	108,938.28
Fiscal year ended 4/30/43	A A A Plumb- ing Corporation of Texas	39,155.80	31,324.64
Total		<u>\$876,125.49</u>	<u>\$555,992.78</u>

five years' imprisonment, consecutive with respect to the sentence imposed on the first six counts (R. 984). The court indicated that upon payment of the tax or a substantial part thereof, it would consider a "petition, or an application to probate the last five years" (R. 984). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment of conviction was affirmed (R. 1002). A petition for rehearing was denied (R. 1008).

The evidence showed that the petitioner, a man of wealth and enterprise, acquired in the year 1940 a one-half interest in a corporation later known as the A A A Air Conditioning and Manufacturing Corporation of Texas. Later, he formed a number of other purported corporations, and an alleged partnership and trust. These subsidiary corporations and companies were supposedly formed for the purpose of meeting competition and minimizing corporate tax liability, and were known as the A A A Roofing Corporation, A A A Plumbing Corporation, A A A Building Corporation, A A A Engineering Corporation, and the A A A Finance Company, a partnership. The petitioner filled the key positions of these newly formed corporations with dummy stockholders and puppets, including relatives and minor employees who received only meager salaries, and had no authority or responsibility commensurate with their positions. The petitioner soon bought out the owner of the other fifty per cent interest in the various A A A enter-

prises, and thereafter they were at all times subject to his complete domination and control. Under his direction, they made substantial profits in subcontracting building and construction work on army bases during World War II.

The evidence showed that the petitioner, during this period, in order to conceal his true income for tax purposes, resorted to various schemes and subterfuges. He made his twenty-one year old nephew a co-partner in his A A A Finance Company. The nephew received a small salary, performed only minor clerical and bookkeeping duties, and never received any of the profits. The petitioner, nevertheless, reported one-half of the partnership income and profits as that of his nephew and alleged co-partner. He and his wife also established the N. S. Locke Trust No. 1, purporting to be an irrevocable trust in favor of his wife and niece. He transferred the A A A Building Corporation stock and building to this trust. Thereafter, he sold the building for \$54,000 and pocketed the proceeds, later giving one-half to his wife. He never reported this amount received as a taxable dividend, and later dissolved the trust, giving the niece ten dollars as her share.

The petitioner paid his employees a fictitious bonus for the purpose of concealing his taxable income by padding the books with a deductible expense item. He drew corporation checks in large sums payable to his employees, designating them

as bonus salary. At his direction, the employees immediately endorsed the checks in blank and returned them to the company, after which they were run through the company's bank account. The petitioner then had his employees report the amount of the fictitious bonus as their individual income, and the company then paid the amount of tax due thereon for them, after which the entire bonus was set up on the books of the company as a deductible expense from taxable income. The employees were advised that stock or bonds would be issued to them in the amount of the unpaid bonus, but neither the stock nor the bonus was ever delivered to them.

The petitioner also was shown to have reported taxable income for a high tax year to be that of the prior low tax year. He would report directors meetings of his alleged corporations which were never held, and thereupon write fictitious minutes of the purported meetings which he would later have signed by the corporation officers who were supposed to have attended them. The petitioner was shown to have expressed the hope that his books "got scrambled up to where nobody could ever tell anything about them." In each of these instances, as the court below stated, "he was shown to be acting as *alter ego*, or in fact, the corporation itself." (R. 999-1000.)

ARGUMENT

I

The trial court properly instructed the jury as to the requisite element of wilfulness. The charge was carefully drawn² and in all respects meets the test enunciated by this Court in *United States v. Murdock*, 290 U. S. 389.

² The court charged that the "gist of the offense charged in the indictment is wilful attempt * * * to evade or defeat the tax imposed by law * * * by purposely failing to report all the income which he knew he had * * *." The attempt "must be made with the intent to keep from the Government a tax imposed by the law * * *;" it "must be wilful, that is, intentionally done with the intent that the Government should be defrauded * * *." (R. 969.) The court further stated that "in determining the guilt of the Defendant, the wilfulness of the act becomes important;" that wilfulness "may not always be proved by direct evidence" and "may often be inferred from the conduct of the parties," and "from the circumstances surrounding the acts of the parties." (R. 970.) The court further instructed the jury, as requested by the defendant (R. 972):

* * * the filing of an incorrect Income Tax Return by the taxpayer, is not within itself a violation of the law. It becomes an offense only when intentionally filed, knowing it to be incorrect, and with an intent to evade or defeat the lawful tax due thereon.

Finally, the court gave the jury charge No. 9 requested by the defendant, charging that the word "attempt" contemplated "an affirmative overt act on the part of the Defendant tending to show a design and purpose of wrong doing;" and that it was necessary for the jury to find beyond a reasonable doubt "that an intent existed to defeat or evade a tax * * *." (R. 972-973.)

II

The trial court properly admitted the evidence of which the petitioner complains. The testimony, *inter alia*, of sham stock ownership and office holding and of the purported but deceptive administration of the petitioner's corporations by dummies (R. 999-1000) was clearly admissible, if for no other purpose than to show the petitioner's control over his affairs and knowledge of his fiscal responsibilities. See *United States v. Johnson*, 319 U. S. 503, rehearing denied, 320 U. S. 808; *Cooper v. United States*, 9 F. 2d 216 (C. C. A. 8th). That some witnesses were in some instances questioned concerning their duties and connections with corporations not involved in the indictment did not impair the admissibility of their testimony; these latter organizations were "subsidiary corporations and companies * * * supposedly formed for the purpose of meeting competition and minimizing corporate tax liability * * *." (R. 999.) Finally, testimony regarding the petitioner's employment of attorneys for "protection" purposes (R. 667) had patent relevance to the question of intent.

III

The trial court's refusal to charge the jury *in haec verba* that the indictment did not constitute evidence does not warrant review. The substance of the requested instruction was covered by the general charge which adequately instructed the

jury that guilt had to be established without reference to the indictment.³ (R. 968.) The court's reference to the indictment for the monetary particulars of the charges cannot be interpreted as suggesting that the indictment had any probative effect. (R. 970.) Assuming, *arguendo*, that the requested instruction was not covered by the general charge, there is, nevertheless, no patent conflict between the decision of the court below and *United States v. Schanerman*, 150 F. 2d 941 (C. C. A. 3d);⁴ and, if there were, the decision in the *Schanerman* case would appear to be questionable in view of this Court's later discussion of the so-called harmless error statute⁵ in *Kotteakos v. United States*, 328 U. S. 750.

³ The court charged as follows (R. 968):

To this indictment the Defendant, Newton Samuel Locke pleads "Not Guilty". The plea of Not Guilty put the burden upon the Government to prove the truthfulness and correctness of the charges contained in said indictment, and the Government must establish such proof to the satisfaction of the Jury, beyond a reasonable doubt; and, unless and until you believe the Government has so established its case, the Defendant is entitled to a verdict of "Not Guilty" at your hands.

⁴ Even if the lower court's decision in the instant case had discussed the question whether the trial court had erroneously failed to charge the jury, there would be no conflict with *Cooper v. United States*, 9 F. 2d 216 (C. C. A. 8th), as asserted by petitioner. (Br. 14.) The reversal in the latter case rests on a multiplicity of errors.

⁵ Section 269 of the Judicial Code, as amended (28 U. S. C. 1940 ed., Sec. 391).

CONCLUSION

The decision below is correct. No important question of law or conflict of decisions is presented. It is respectfully submitted that the petition should be denied.

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May, 1948.